(19) (27)

FILED
JUL 7 1943
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM—1942

No. 151

FIRST TRUST & DEPOSIT COMPANY and EDITH G. BALLARD, as Executors of the Last will and Testament of WILLIAM M. BALLARD, Deceased,

Petitioners,

vs.

FRANK J. SHAUGHNESSY, Collector of Internal Revenue of the United States, for the 21st District of New York,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

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INDEX

I. PETITION FOR WRIT OF CERTIORARI — PAGE

Opinions Below — 2

Basis of Jurisdiction — 2

The Statute Involved — 3

Summary Statement of Matters Involved — 4

Basis of Decision of Circuit Court — 9

Questions Presented — 10

Reasons Relied on for Allowance of Writ — 11

CITATIONS

Cases:

Becker v. *St. Louis Union Trust Company*, 296 U. S. 48 — 12

Brady v. *Ham*, 45 Fed. (2d) 454 — 4

Commissioner v. *Porter*, 60 Fed. (2d) 673, affd. 288 U. S. 436 — 4

Denniston v. *Commissioner*, 106 Fed. (2d) 925 — 12

Flack v. *Holtegel*, 93 Fed. (2d) 512 — 12

McGrew, F. B., Estate of v. *Commissioner*, 135 Fed. (2d) 158 — 12

United States v. *Wells*, 283 U. S. 102 — 12

Statutes:

Revenue Act of 1926 as amended, Section 302 (c) — 3

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To the Honorable Chief Justice and
Associate Justices of the Supreme
Court of the United States:

First Trust & Deposit Company and Edith G. Ballard, as Executors of the Last Will and Testament of William M. Ballard, deceased, respectfully petition that a writ of certiorari issue to review the decree of the United States Circuit Court of Appeals for the Second Circuit entered herein April 24, 1943 (R. p. 264), affirming with costs a

judgment of the District Court of the United States for the Northern District of New York entered April 18, 1942, dismissing on the merits the complaint herein pursuant to a verdict directed in favor of the defendant-respondent by the trial Judge at the conclusion of the trial (R. p. 29).

This action was brought to recover estate taxes levied and collected on property which the Commissioner of Internal Revenue had added to the gross estate as returned by the executors, on the ground that such property was to be included in the decedent's gross estate as transfers made in contemplation of death within the meaning of Section 302(c) of the Revenue Act of 1926 as amended.

Opinions Below

There was no opinion made or filed by the trial Court other than the verbal opinion appearing at pages 206-213 of the record.

The opinion of the Circuit Court is printed at pages 243-248 of the record and is reported in 134 Fed. (2d) 940. In its opinion the Circuit Court said:

> "The only question, therefore, was whether reasonable persons might have concluded from all the evidence that Ballard had not made the gift 'in contemplation of death'; although it is true that upon that issue the plaintiffs are entitled to every intendment in their favor." (R. p. 246.)

Also:

> "The condition of Ballard's health and his state of mind towards his death had nothing whatever to do with the case." (R. p. 248.)

Basis of Jurisdiction

The opinion of the Circuit Court of Appeals was filed April 8, 1943. A petition for re-hearing was filed April 20,

1943 (R. pp. 249-260). Re-hearing was denied April 21, 1943 (R. pp. 261-263). A decree affirming the judgment appealed from and ordering that a mandate issue was entered April 24, 1943 (R. pp. 264-265).

Jurisdiction is invoked under Section 240(a) of the Judicial Code as amended by the act of February 13, 1925, 43 Stat. 938 (Section 347 of Title 28, USCA).

Statute Involved

The statute involved is Section 302(c) of the Revenue Act of 1926 as amended. Said act in 1935 at the date of the death of Mr. Ballard read as follows:

> "The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside the United States * * *
>
> (c) To the extent of any interest therein of which the decedent has at any time made a transfer by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either along or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown

to the contrary, be deemed to have been made in contemplation of death and within the meaning of this title."

SUMMARY STATEMENT OF MATTERS INVOLVED

The Transfers in Question

On January 16, 1929, Mr. Ballard transferred nine life insurance policies on his life to City Bank Trust Company, as trustee under a typical form of unfunded life insurance trust then in general use. The trustee was to receive any dividends upon the policies and apply them in payment of the premiums, with Ballard to make up any deficiency. On his death the trustee was to collect the proceeds, hold them in trust for the benefit of his wife, Edith G. Ballard, during her life and upon her death pay the principal to his three daughters. Ballard retained no power to revoke but did retain the right to change the beneficiaries, except that he had no power to name himself as beneficiary (Exhibit 10, R. pp. 201, 217-225 and p. 244).

Some years later Ballard became concerned as to whether the reservation of the power so to change the beneficiaries might not subject the policies to an estate tax and in December, 1934, he consulted Mr. Benjamin E. Shove, one of his attorneys, who advised him that there was a chance that this might be so, owing to a change in the law made after the trust was executed (R. pp. 45, 181, 183, 244). (The Supreme Court had ruled that *Commissioner* v. *Porter*, 60 Fed. (2d) 673, affd. 288 U. S. 436, 53 S. Ct. 451, rather than *Brady* v. *Ham*, 45 Fed. (2d) 454, was the law.)

Mr. Ballard thereupon instructed his attorney to terminate the 1929 trust so that he could give the policies outright to his wife so that she would have the largest benefit of them (R. pp. 180, 182). At the end of December, 1934, he went to the offices of the First Trust & Deposit Com-

pany (successor by merger to City Bank Trust Company), got the policies, brought them home, handed them to his wife, who then put them in their safe deposit box (R. p. 197, 65).

Subsequently Mr. and Mrs. Ballard talked about her putting the policies in a trust and Mrs. Ballard, with Mr. Ballard joining her at times, gave instructions to Mr. Shove to prepare for her a new trust agreement (R. pp. 66, 68, 69, 188).

On March 26 and 27, 1935, the necessary papers were executed to terminate the 1929 trust and the policies with formal documents of transfer were delivered by Mr. Ballard to Mrs. Ballard (R. pp. 4, 185, 202, Exhibits 1-9, R. pp. 214-216).

This is the transfer the taxability of which is involved.

On March 28, 1934, Mrs. Ballard signed a trust agreement with the First Trust & Deposit Company (Exhibit 11, R. pp. 201, 225-232). Changes of the beneficiary to the trust company as trustee under such agreement were executed by Mrs. Ballard on March 28, 1935, with respect to six of the policies. Two of the policies were assigned to such trustee on April 18, 1935, and one was assigned on April 30, 1935 (R. pp. 214-216).

Under this agreement Mrs. Ballard agreed to pay all premiums, reserved the right to revoke it, to change the beneficiaries under it, to withdraw any policy and exercise any privilege reserved in the policy in favor of its "owner". On Mr. Ballard's death the trustee was to collect and invest the proceeds of the policies and pay the income and in its discretion the principal to Mrs. Ballard and at her death was to distribute the principal among her three daughters.

If she died before Mr. Ballard, the trust was to cease and the trustee was to assign the policies to Mr. Ballard (R. p. 245).

The Circuit Court of Appeals stated (1) that Mr. Ballard's termination of the 1929 trust and the transfer by Mrs. Ballard of the policies to the 1935 trust was part of a single plan (R. p. 244) and (2) that the shift from the 1929 trust to the 1935 trust was impelled only by Mr. Ballard's desire to escape the estate taxes on the policies (R. pp. 247, 248).

Mrs. Ballard paid the premiums after March, 1935 (R. pp. 71, 73).

The cash value of the policies in March, 1935, was approximately $50,000. The face amount was $130,000. Mr. Ballard's gross estate, including the life insurance less exemption, was $244,968.77 (R. p. 6).

The Donor's Health, State of Mind and Activities

The Circuit Court of Appeals in its summation of the facts said:

> "At the time of the gift Ballard was a man of 64, in active business in the City of Syracuse as a building contractor. Doctors had pronounced him in good health and he had apparently the same life expectancy —over eleven years—as any other man of his age. However, he died unexpectedly about eight months later—in November, 1935—and the amount of the policies was included in his estate upon the theory that he had made the gift in contemplation of death" (R. p. 245).

The Trial Judge in his summary of the facts said:

> "There is not any evidence in the case whereby the plaintiffs ever stated, or so far as the evidence

shows, no evidence, stated that he thought he was about to die, or soon would die, and there is not, as I recall, any evidence in the case of any actions, that is, actions, I mean in connection with the carrying on of his business, or his activities in his family, that would indicate that he had death in mind. So much for the negative part of the testimony.

The testimony of the plaintiffs in substance can be stated that the testator was about sixty-four years old, that he was the head and the dominant factor in Ballard & Company, a contracting firm; that he carried on up to the time of his death, with short intervals caused by vacations and in one or two instances sickness, the business of the Company, and in addition acted as a director and appraiser for the Bank; that his attitude toward his business was one of optimism and an attitude of planning for the future, which was shown by the fact that he at the time of his death had contracts which would not be, under the terms, finished for some time in the future" (R. p. 206).

The attorney who advised Mr. Ballard that the 1929 trust might be subject to a tax owing to a change in the law also testified on cross-examination:

"Q. Did you mention to Mr. Ballard the possibility somebody in the Treasury Department might conceivably say these policies were given in contemplation of death? A. No, I did not.

Q. You are familiar with the law which says gifts in contemplation of death are included in the decedent's estate? A. Yes, I am.

Q. You were aware that was a possibility? A. No, I wasn't aware.

Q. Of a possibility, I said? A. No, it never entered my head." (R. p. 139.)

Mr. Ballard carried on his contracting business through William M. Ballard Company (R. p. 84). Most of his work was for the New York Central. In 1934 the New York

Central was eliminating its tracks at grade in Syracuse and it was contemplated that six different contracts would be let in connection therewith, namely, contracts for the construction of the signal tower, the passenger station, the mail and service building, the towers, the maintenance and ways building and the repair shops (R. p. 121). Mr. Ballard had for some years been telling his friends, associates and family that he intended to try for all these contracts (R. pp. 90, 99, 114, 192).

On December 8, 1934, he was awarded the first of the jobs, the construction of the signal tower at Syracuse junction (R. p. 84). In May, 1935, the contract for the new passenger station was awarded to him on his bid of $451,-964.50 (R. p. 87). In September, 1934, he won on a bid of $174,943.36 the mail and service building job (R. p. 91).

Mr. Ballard was a hard worker, working all day every day and frequently at night. When preparing bids he worked every night until 10 or 11 P. M. (R. pp. 47, 115, 116).

In November, 1935, he put in a bid for the tower contract and his company was awarded the contract on this bid after he died unexpectedly on November 26, 1935 (R. p. 121).

Mr. Ballard was a member of the Trust Committee of the First Trust & Deposit Company. In 1934 he attended all the committee meetings except three; in 1935, all but four. In these two years he made 222 inspections and appraisals as a member of the Real Estate and Mortgage Committee (R. pp. 193-194).

The whole Ballard family was trust-minded. His three daughters on his advice had created educational trusts for their children, partly from moneys which he had given (R. p. 105).

Mr. Ballard was part owner of the Marsellus Lumber Company of Oneida, New York, and throughout 1934 and 1935 continued his practice of going to Oneida once or twice a week to look after his interests there (R. pp. 111-112).

In January and February of 1935 Mr. and Mrs. Ballard made their annual trip to Florida. He drove his automobile all the way, sometimes as much as 500 miles a day (R. pp. 41, 80).

In the summer of 1935 he rented for the use of his family a cottage at Cape Cod. He spent nearly every week-end there, personally driving his automobile the round trip of 700 miles. He loved Cape Cod, and planned to buy or rent a cottage for the summer of 1936 (R. pp. 38, 101, 109, 194).

Mr. Ballard was sociable, happy and jolly by nature. He was not a worrier (R. pp. 53, 103). He was cheerful on the job and had the vigor and enthusiasm of the normal man with a big job (R. p. 89). He was devoted to his wife, his daughters and grandchildren. He was a good boss, knowing all of his employees by name. In July, 1935, he encouraged his office manager to buy a home and spoke confidently of the future (R. pp. 71, 72, 114, 122).

Basis of Decision of Circuit Court

The Circuit Court of Appeals held that the transfers were made in contemplation of death, regardless of the donor's condition of health and state of mind towards his death because it held, as a matter of law, that his dominant, more important or only motive in making the gift was to save estate taxes.

The reasons for the Circuit Court of Appeals' decision as to what was the dominant motive of the donor appear in its opinion on pages 246-248 of the record.

The Circuit Court of Appeals held:

That the provisions of Mrs. Ballard's trust are to be imputed to Mr. Ballard.

That as a result of the reservations made by Mrs. Ballard in the trust created by her, a jury would have been entitled to find that Mr. Ballard expected that Mrs. Ballard might use the policies during his lifetime "either for her own benefit or perhaps to assist him if his affairs needed assistance."

That, however, until the plaintiffs showed that the donor was actuated more by the expectation that the donee would use the property during his lifetime than by the expectation that she would not use it until his death, "the very fact that the shift from the first to the second trust was impelled only by a desire to escape estate taxes, which could not fall due before he died, was nearly, if not quite, conclusive proof that the powers reserved were not deemed as important as the post mortem disposition."

"That the condition of Ballard's health and his state of mind towards his death had nothing whatever to do with the case" (p. 248).

That there was no question of fact for the jury to decide and it was right to direct a verdict.

Simply stated, the basis of the decision of the Court below was its finding that the dominant, more important, or only purpose of the donor in making the gift was to save estate taxes.

Questions Presented

(1) Whether a voluntary transfer can be held, as a matter of law, to have been made in contemplation of death without any consideration of the donor's condition of health and his state of mind towards his death.

(2) Whether a voluntary transfer can be held, as a matter of law, to have been made in contemplation of death because the dominant purpose of the donor in making the gift was to save estate taxes,

(a) Regardless of the donor's condition of health and his state of mind towards his death,

(b) In a case where the donor has given the donee the right to use the gift during the donor's lifetime and a jury would be entitled to find that the donor expected that the donee might use it either for her own benefit or perhaps to assist the donor if his affairs needed assistance.

(3) Whether a question of fact for the jury is presented upon a record which discloses

(a) that donor was in good health, in active business, optimistic, and planning for the future, 64 years of age and apparently had the same life expectancy—over 11 years—as any other man of his age;

(b) that the sole evidence as to statements made by the donor is the testimony of the donor's attorney that the donor wished to save estate taxes;

(c) that the donor modified a gift previously made which could not be used until after his death to one which could be used by the donee during his lifetime;

(d) that the Trial Court under the objection of the defendant refused to admit evidence of what the donor said to the donee about the gift (R. p. 46).

Reasons Relied on for the Allowance of the Writ

(1) The Circuit Court of Appeals has held in this case that a transfer can be held to have been made in contemplation of death within the meaning of Section 302(c) of the

Revenue Act of 1926 as amended and that the donor's condition of health and his state of mind toward his death has nothing whatever to do with the case (R. p. 248). This is a novel and startling doctrine. It is in conflict with the decision of other Circuit Courts of Appeal and with applicable decisions of this Court. See particularly, *United United States* v. *Wells*, 283 U. S. 102, 51 S. Ct. 446; *St. Louis Union Trust Company* v. *Becker* (8th Circuit), 76 Fed. (2d) 851, at page 863, affd. *Becker* v. *St. Louis Union Trust Company*, 296 U. S. 48, 56 S. Ct. 78; *Flack* v. *Holtegel* (7th Circuit), 93 Fed. (2d) 512, at page 514; *Estate of F. B. McGrew* v. *Commissioner*, decided by the Circuit Court of Appeals for the Sixth Circuit April 12, 1943, 135 Fed. (2d) 158.

(2) The Circuit Court of Appeals' decision that simply because a donor is impelled to make a gift only by a desire to escape taxes on the property transferred is, as a matter of law, made in contemplation of death, irrespective of his condition of health and his state of mind toward death, is in direct conflict with the decision of the Circuit Court of Appeals, Third Circuit, in the case of *Denniston* v. *Commissioner*, 106 F. (2d) 925.

This Court has never passed upon the question of what weight should be given to the fact that a donor desired by a particular transfer to reduce estate taxes in deciding whether the transfer was made in contemplation of death. This question has arisen in innumerable cases. Today most men and women with property are doing something to reduce their taxes—income taxes, estate taxes, other taxes —and in so doing have no thought of death in mind at all. The decision below involves a principle concerning the collection of internal revenue of far-reaching importance. The question has not been but should be settled by this Court.

(3) The petitioners do contend that on the record herein the Court should have submitted to the jury the question whether the gift was made in contemplation of death.

The questions involved are of the greatest importance to thousands of citizens.

It is common knowledge that the rich man who has retired from active business or who is in failing health consults a tax expert before he makes a gift and that there will be plenty of evidence after his death that he never mentioned estate taxes but that he did talk to many witnesses about a so-called life motive.

On the other hand, it is equally common knowledge that thousands of men of moderate wealth and in the full vigor of life make gifts to members of their families for the obvious business reason of saving estate taxes by paying a smaller gift tax and that they never bother to tell anyone about a so-called life motive.

If the decision of the Circuit Court of Appeals stands, its practical effect will be to penalize young, vigorous and healthy men who have made gifts to members of their families, who have paid gift taxes for the primary purpose of saving estate taxes and who have assumed that what they did was perfectly legal and not directly or indirectly comprehended within Section 302(c) of the Revenue Act of 1926 as amended.

Conclusion

For the foregoing reasons it is respectfully submitted that this petition should be granted.

FIRST TRUST & DEPOSIT COMPANY and
EDITH G. BALLARD, as Executors of
the Last Will and Testament of
WILLIAM M. BALLARD, Deceased.
By STEWART F. HANCOCK,
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Counsel for Petitioners